Supreme Court, U. S.
FILED
MAY 27 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1592

KEITH B. DAVIS,

Appellant,

vs.

JAN L. DAVIS,

Respondent.

On Appeal from the Supreme Court of Minnesota

MOTION TO DISMISS OR AFFIRM

KEITH B. DAVIS
210-4 Plymouth Court
Office Center
12805 Highway 55
Plymouth Village, Minn. 55441
Pro se

ARTHUR MACK
Larkin, Hoffman, Daly &
Lindgren, Ltd.
1500 Northwestern Financial
Center
7900 Xerxes Avenue South
Minneapolis, Minn. 55431
Attorneys for Respondent

1976—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

SUBJECT INDEX

		page
A.	First Argument of Law	1
B.	Second Argument of Law	5
C.	Third Argument of Law	7
D.	Argument of Equity	9
E.	Summary and Prayer for Award of Damages and Double Costs.....	12

TABLE OF CASES

	page
California	
In Re Walton's Marriage (1972) 104 Cal.Rptr.472,28C.A.3d108	3
Michigan	
Johnkoski v. Johnkoski (1973) 213N.W.2d856, 50 Mich.App.542	5
Minnesota	
Lindberg v. Lindberg 282Minn.536, ... 163N.W.2d870(1969)	8
Ryg v. Kerkow, 296Minn.265,207N.W.2d ..... 701(1973)	8
U.S. Supreme Court	
Yick Wo v. Hopkins, 118U.S.356, ... 6 S.Ct.1064	7

FEDERAL STATUTES

	page
28 U.S.C. 2103	12, 13
U.S. Constitution, Amendments V, XIII, XIV	7

CALIFORNIA STATUTE

West's Ann. Civ.Code, Sec. 4508	3

MICHIGAN STATUE

M.C.L.A. 552.6	5

MINNESOTA STATUES

M.S.A. 518.06	1, 2, 3, 4, 5
M.S.A. 518.14	4, 5, 6
M.S.A. 518.17	4
M.S.A. 518.63	4

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1975

No. 75-1592

Keith B. Davis,

Appellant,

vs.

Jan L. Davis,

Respondent.

On Appeal From The Supreme Court of Minnesota

MOTION TO DISMISS OR AFFIRM

COMES NOW THE RESPONDENT Jan L. Davis and, through her attorneys Larkin, Hoffman, Daly & Lindgren, Ltd. by Arthur Mack, Esq. in support of her Motion to dismiss with prejudice the appeal or petition for a writ of certiorari of the Appellant and to affirm the decision of the Minnesota State Supreme Court, states as follows:

1. M.S.A. 518.06 IS NOT PRIMARILY A NO-FAULT DISSOLUTION STATUTE, NOR IS IT UNCONSTITUTIONAL:

The Appellant, in his Jurisdictional Statement, makes continual reference to the Minnesota "No-fault" Statute in an attempt to demonstrate that the trial Court's having found him to have particpated in a course of conduct detrimental to the marriage relationship was anomalous and incorrect. The fact of the matter is that in 1974, when the Minnesota Legislature adopted the present M.S.A. 518.06 and repealed the previous divorce statute that it left intact five (5) of the previous fault grounds as evidence of the irretrievable breakdown of a marriage and added only one new criterion as proof of such breakdown, to-wit:

> "Serious marital discord adversely affecting the attitude of one or both of the parties towards the marriage".

The former "cruel and inhuman treatment" was replaced by "a course of conduct detrimental to the marriage relationship of the parties seeking the dissolution" in 1971. There is no ambiguity in the State of Minnesota as to the meaning of these grounds; the Minnesota literature is replete with case law interpreting them. The Appellant either failed to consult the writings or intentionally ignored them in order to propound the specious

argument which he now advocates. The Respondent submits that there is simply nothing whatsoever anomalous about the trial Court's finding the Appellant to have engaged in a course of conduct detrimental to the marriage.

California has adopted what we might call "pure no-fault" dissolution. West's Ann. Civ. Code, Sec. 4508 states:

> "Irreconcilable differences which have caused the irremediable breakdown of the marriage . . . "

are the basis for ordering dissolution of marriage. And California does not list specific statutory methods to make out the irremediable breakdown of the marriage, as does Minnesota. In a constitutional attack on the California Statute the high Court of California held that,

> "This Section is not unconstitutional as being unreasonably uncertain and ambiguous, since it plainly refers to existence of marital problems which have so impaired the marriage relationship that legitimate objects of matrimony have been destroyed and as to which there is no reasonable possibility of elimination, correction or resolution". In Re Walton's Marriage (1972) 104 Cal. Rptr.472,28C.A. 3d108;

The Appellant argues as if M.S.A.518.06 is the only

governing Statute relative to the matters which were adjudicated in his dissolution. He fails to point out that the custody decision, for example, was determined in light of M.S.A.518.17 which sets forth in great detail the factors to be considered and evaluated in making a judgment which is in "the best interests of the children". The Appellant makes a similar failure with respect to his complaint that the homestead was not awarded to him. M.S.A.518.63 is entitled "Homestead, Occupancy" and it provides that,

> "The court, having due regard to all the circumstances and the custody of any children of the parties, may award to either party the right of occupancy of the homestead of the parties, exclusive or otherwise, upon a final decree of divorce, or proper modification thereof, for such period of time as may be determined by the court, and such award of the right of occupancy of the homestead, whether exclusive or otherwise, may be in addition to the maximum amount which may be awarded under Section 518.59."

Clearly Minnesota has a complete and thorough battery of statutory law to handle the myriad issues which the Appellant has attacked under M.S.A. 518.06 and M.S.A. 518.14. The Attorney General of the State of Minnesota made no attempt to defend the constitutionality of the entire Section of laws dealing with

dissolution when he was apprised of the Appellant's intention to so attack. The Respondent submits that the Attorney General's confidence in the Minnesota laws is well justified.

We note also that the Appellant argues the constitutionality of M.S.A. 518.06 for the first time on appeal. The Michigan case of Johnkoski v. Johnkoski (1973) 213N.W.2d856, 50 MichApp. 542, held that a "challenge to the constitutionality of 'no-fault' divorce act (M.C.L.A.552.6), . . . would not be considered where raised for first time on appeal." We submit that that is the proper ruling in the instant case also, the Appellant having failed to raise the issue at any time prior to appeal.

2. M.S.A. 518.14 IS NOT UNCONSTITUIONAL:

This Statute permits the trial Court, in its discretion, to "require one party to pay a reasonable amount, necessary to enable the other spouse to carry on, or to contest the proceeding, and to support such spouse and the children during its pendency." This discretionary provision is implicitly and absolutely fair. We note that the Appellant did not attack the

Judgment ordering him to pay a portion of his wife's attorneys' fees as an abuse of discretion (probably because there was no evidence of any abuse of discretion) but that he came from an entirely different direction, characterizing such an Order as slavery or involuntary servitude. This contention is so far out that it is difficult to argue with; the Supreme Court of Minnesota charitably characterized such a contention as "novel"; the Respondent would submit that frivolous, contrived, harassing, specious and wasteful are probably much more accurate characterizations of the Appellant's contentions.

If the Statute compelled a husband to pay a wife's attorneys' fees in every case, then some general discrimination against husbands could probably be argued. On the other hand, if the Statute totally precluded the Court from ordering the husband to pay a portion of the wife's attorneys' fees in any case then the rights of all wives as a class could certainly be said to be impinged upon in view of the traditional husband control over the marital purse strings. The trial Court, in the instant case, has merely exercised

its proper discretion in ordering the Appellant to pay a portion of his wife's attorneys' fees.

3. THE APPELLANT HAS SUFFERED NO UNCONSTITUTIONAL DEPRIVATION OF RIGHTS UNDER EITHER THE FIFTH AMENDMENT, THIRTEENTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

How can a party to a proceeding who has had a combination of 18 hearings, motions and appeals heard, ruled upon and adjudged claim that he has been denied due process? Yet, by specious argument and by presentation of less than complete facts, that is what the Appellant in the instant case would claim. Neither the record nor any part of it will support such a contention.

How can a lawyer, who should know better, cite cases which are wholly not in point in support of his alleged position that he has been denied equal protection? The Appellant has not made a showing that he is or was one of a class to whom justice was applied with an uneven hand as mandated in the case of Yick Wo v. Hopkins 118 U.S. 356, 6 S Ct. 1064, 30 L. Ed. 220.

In attacking the propriety of the custody award he

cites two (2) cases; one deals with custody of parents vis a vis third parties, the other deals with custody of parents vis a vis the State in a dependency petition. In no case does he cite authority for his position relative to a custody grant between parents. As pointed out above, the Appellant has chosen to ignore the fact that the custody grant was grounded in the trial Court's broad discretion in applying the "best interests of the children" standard. He has also chosen to overlook the specific language in the opinion of the Minnesota Supreme Court in his own case where it held that, "also this Court has held that minor children may be intrusted to one parent's custody even if no specific finding of the other's unfitness was made, Lindberg v. Lindberg 282Minn. 536,163N.W.2d870 (1969); or even if both parents are found equally fit to have custody. Ryg v. Kerkow, 296 Minn. 265, 207 N.W.2d. 701 (1973)". It is particularly ironic that the Appellant attacks a custody determination made in Hennepin County, where a substantial number of male parents are granted custody in cases in which custody is an issue.

4. THE APPELLANT IS IMPROPERLY BEFORE THIS COURT, HIS HAVING FAILED TO DO EQUITY WITH RESPECT TO ORDERS AND JUDGMENTS VALIDLY RENDERED IN THE STATE OF MINNESOTA.

"He who seeks equity must do equity." "He who comes into equity must come with clean hands." To date the Appellant has been adjudged guilty of constructive civil fraud in the State of Minnesota and is at liberty on a stayed sentence of 30 days in the Hennepin County Work House. In 1975 the Appellant paid a total of $787.50 for child support for his three minor children; this is in derogation of the $5,400.00 amount he was ordered to pay in accordance with the 1974 Judgment and Decree, at the rate of $450.00 per month, a manifestly reasonable sum for a duly-qualified, physically capable, full-time attorney-at-law. He has paid none of the attorneys' fees which he has been ordered to pay. On May 12, 1976 he stopped payment on the $225.00 check which he had given the Respondent on May 10, 1976 for child support.

At page 2 of the Appellant's Application for Extension of Time in Which to Docket Appeal from Minnesota Supreme Court, the Appellant stated that,

"it is believed that the Appellee's interests will in no way be prejudiced or harmed by this extension, if it is granted. And the extension is being limited to 30 days to assure that the Court may be able to dispose of this appeal before it adjourns in June." That statement is tantamount to fraudulent misrepresentation, and must not be condoned. Not only did the Appellant know that the Appellee's interests would in fact be prejudiced by this extension because of the effect of the lis pendens on the sale of the homestead which the Appellee was forced to sell due to the Appellant's failure to make child support payments but the Appellant applied for a second extension of time in which to docket his appeal, thereby evidencing his true intent not to have this Court dispose of this Appeal before it adjourns in June. The Appellant intends by means of any method or scheme to block the pending sale of the homestead in which the Respondent and the minor children now live; a letter received May 12 evidencing that intention is reproduced herein as follows:

May 11, 1976

Floyd B. Olson Realty Company
11425 Olson Memorial Highway
Plymouth, Minnesota 55441

Attention: Mr. Jerry Slaven

Re: FN250 Davis
3305 Lanewood Lane
Wrongful Sale

Dear Mr. Slaven:

This shall confirm our telephone conversation on the morning of May 10, 1976.

It is understood that Olson Realty obtained a buyer for the residence at 3305 Lanewood Lane, Plymouth, Minnesota, and that a Purchase Agreement has been entered into between that buyer and Jan L. Davis.

As you were advised, I claim an interest in the home and have an appeal pending in the United States Supreme Court of the judgment in the dissolution proceeding by which Jan Davis apparently claims title to the home.

As you were also advised, notice of my claim is of record by means of a Notice of Lis Pendens filed last Fall.

You were further advised that it is my intention to live and raise my children at 3305 Lanewood Lane.

For the record, the divorce decree provided that I was to Quit Claim 3305 Lanewood Lane to Jan. This I did shortly after the decree was entered. In accordance with law, the Quit Claim deed was delivered to the Clerk of District Court pending resolution of all appeals.

An extra copy of this letter is enclosed for transmittal by you to the buyers.

Sincerely,

Keith B. Davis

KBD:ja
Encl: copy
cc: J. Whalen - Fazendin Realty, New Hope
Jan L. Davis
Arthur Mack

.. THE APPELLANT'S APPEAL OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI, IS IMPROVIDENTLY TAKEN FROM THE DECISION OF THE SUPREME COURT OF THE STATE OF MINNESOTA, AND THERE IS NO REASONABLE GROUND FOR GRANTING HIS PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28U.S.C.2103.:

The Respondent gains her livelihood from the sale of her work as an artist. We would ask the Court to judicially notice the fact that a creative artist must be in a certain uninhibited and productive frame of mind in order to create expressive, salable works. The Respondent has been so distraught by the destructive, demeaning and vicious acts of the Appellant that she has been compelled to turn down commission painting work. She is reluctant to undertake such work in her present state of mind for fear of damaging her reputa-

tion as an artist. She has been generally unproductive in non-commission work also. Her true costs, aside from those associated with the sale of the home, due to the delay for the hearing of this Appeal are $3,000.00. The value of attorneys' fees and costs associated with preparation for this Appeal is $880.00. Wherefore, pursuant to 28 U.S.C. 2103, the Respondent and her attorneys request damages and double costs.

Respectfully submitted:

Arthur Mack, for
LARKIN, HOFFMAN, DALY & LINDGREN, Ltd.
Attorneys for Respondent
1500 Northwestern Financial Center
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431
835-3800

Keith B. Davis, pro se,
and Attorney for Respondent
Appellant
210-4 Plymouth Court
Office Center
12805 Highway 55
Plymouth Village, Minnesota 55441